

Friday, 12 April 2024

Daily Civil Law A Daily Bulletin listing Decisions of Superior Courts of Australia

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CIVIL (Insurance, Banking, Construction & Government)

Executive Summary (One Minute Read)

Minister for Immigration, Citizenship and Multicultural Affairs v McQueen (HCA) - when personally considering whether to revoke a visa cancellation, the Minister does not need to personally consider all the relevant material, but may rely on the Department's summary of that material (I B)

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (HCA) - error of Tribunal in failing to properly apply Direction 90 was material (I B)

Star Kingdom Investments Pty Ltd v Camatic Pty Limited (FCA) - summary judgment granted to a defendant manufacturer of cinema seating, as the cinema had not acquired the seats as a consumer (I B)

McDonald v MAK Constructions and Building Services Pty Ltd (NSWCA) - builder who had a judgment debt after adjudication under the *Building and Construction Industry Security of Payment Act 1999* (NSW) was not entitled to a stay of the owner's proceedings for breach of the construction contract (I B C)

Virgin v Virgin (WASC) - probate in solemn form granted to wife of deceased, where deceased had had early stage Alzheimer's at the time of executing his will (I B)

HABEAS CANEM

Dog dance with ears



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Summaries With Link (Five Minute Read)

Minister for Immigration, Citizenship and Multicultural Affairs v McQueen [2024] HCA 11

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Administrative law - McQueen was United States citizen resident in Australia under five year return resident visa - he was sentenced to 21 months of imprisonment for selling methylamphetamine - his visa was then mandatorily cancelled under s501(3A) of the *Migration Act 1958* (Cth) - the Minister personally decided not to revoke that cancellation under s501CA - the Federal Court set aside the Minister's decision for jurisdictional error - the Full Court of the Federal Court dismissed the Minister's appeal - the Minister applied for special leave to appeal to the High Court, and the High Court heard the special leave application as if on appeal - in the High Court the Minister accepted that the then Minister did not read the applicant's actual submissions or other material, and only read the Department's submission to him and the draft reasons - held: while there is no express statutory obligation to do so, the Minister, when considering whether to revoke a visa cancellation under s501CA, or his or her delegate, nonetheless must read, identify, understand and evaluate the representations received - the breadth of the power conferred by s501CA renders it impossible, and nor was it desirable, to formulate absolute rules about how the Minister might or might not be satisfied about a reason for revocation - no particular statement in the representations given should be characterised as a mandatorily relevant consideration, as distinct from the representations as a whole - not all statutory powers conferred upon a Minister need be exercised personally - where a Minister does exercise a power personally, the law recognises that he or she does not work alone, but makes decisions with the assistance of his or her department, and the law treats the collective knowledge and experience of the department as the Minister's own knowledge and experience - it is not a condition of the valid personal exercise of the revocation power that the Minister personally read and examine the submissions, representations, and other material received - the Minister may rely instead upon departmental briefs and submissions which accurately summarise and order that material - special leave granted and appeal allowed.

<https://eresources.hcourt.gov.au/downloadPdf/2024/HCA/11> (I B)

LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] HCA 12

High Court of Australia

Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot, & Beech-Jones JJ

Administrative law - the appellant was a citizen of Vietnam, who was granted a spouse visa - he was convicted of various offences on three separate occasions, including offences of conspiring to import or export a marketable quantity of a border controlled drug or plant, attempting to possess a marketable quantity of a border controlled drug or plant, and trafficking a drug of dependence - his visa was then mandatorily cancelled under s501(3A) of the *Migration Act 1958* (Cth) - the Minister's delegate decided not to revoke the cancellation - the Administrative Appeals Tribunal affirmed - the Federal Court dismissed an application for judicial review,

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finding no jurisdictional error - the Full Court of the Federal Court dismissed an appeal, finding error but that the error was not material and therefore not jurisdictional - the appellant was granted special leave to appeal to the High Court - held: the Tribunal had breached s499(2A) of the *Migration Act 1958* (Cth) by failing to comply with the relevant Ministerial direction (*Direction No 90 - Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*) - as the unavoidable inference was that the Tribunal misunderstood para 8.1.1(1)(a) of Direction 90, the appellant's conduct, or both, there was a possibility, not fanciful or improbable, that the decision could have been different if the error had not occurred - it would involve improper speculation to attempt to discern how the Tribunal would have reasoned if it had not departed from the required process of reasoning - the error was therefore material - appeal allowed.

<https://eresources.hcourt.gov.au/downloadPdf/2024/HCA/12> (I B)

Star Kingdom Investments Pty Ltd v Camatic Pty Limited [2024] FCA 329

Federal Court of Australia

Meagher J

Consumer law - the parties entered into two contracts for the supply and installation of cinema seating at two cinemas operated by the plaintiff - the plaintiff contended that the defendant breached the contract terms and the statutory guarantee imposed by s54 of the *Australian Consumer Law* that the seating would be of acceptable quality and fit for purpose - the plaintiff alleged that the fabric on the seating crazed, chipped, flaked, detached from its lower surface, displayed a change of colour in patches, and became unsightly within 3 years of installation - the defendant sought summary judgment, or alternatively that certain paragraphs of the statement of claim be struck out for failing to disclose a reasonable cause of action or otherwise being an abuse of process - held: s31A of the *Federal Court of Australia Act 1976* (Cth) empowers the Court to give summary judgment if satisfied that a party has no reasonable prospect of successfully prosecuting or defending the proceeding (or part of the proceeding), as the case may be - s31A(3) provides that a case need not be hopeless or bound to fail in order for it to have no reasonable prospect of success - a prospect of success must be "real" as opposed to "fanciful" or "merely arguable" - in determining whether a proceeding ought to be summarily dismissed, the Court is to have regard to matters of substance, rather than pleading points and form - this involves a prediction of the outcome of a trial on the merits but is not an actual adjudication of those merits - the question as whether s54 of the *Australian Consumer Law* could apply to the plaintiff - s54 applies where a person supplies goods, in trade or commerce, to a consumer - s3 relevantly provides that goods are acquired as a consumer if and only if the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption - that the defendant's seats had twice been installed in private homes did not detract from the evidence that the seats were especially designed for the cinema market and only "very rarely" would less than 300 seats be sold for a single project - these two examples did not show that the seats were marketed or sold for the domestic market, and tended to support the point that the goods in this case are not of a kind ordinarily acquired for personal, domestic or household use - 'ordinarily' means 'commonly' or 'regularly', rather than 'exclusively'

or 'principally' - it was clear that the defendant does not commonly or regularly supply cinema seating for home theatres - on the basis of the price per seat, there was a distinction between the markets for commercial cinema and domestic "home cinema" seating - summary judgment granted.

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2024/2024fca0329> (I B)

McDonald v MAK Constructions and Building Services Pty Ltd [2024] NSWCA 63

Court of Criminal Appeal of New South Wales

Payne & Adamson JJA, & Griffiths AJA

Security of payments - an owner and a builder entered into a contract for residential building work - the contract was later terminated by the owner for breach - at about that time, the builder made a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) for progress payments, and the owner served a payment schedule in response - the builder commenced arbitration under the Act - the owner then commenced proceedings against the builder in the NSW Civil and Administrative Tribunal for recovery of the cost of rectifying alleged defects and costs to complete the building works, claiming damages of about \$530,000 - the arbitrator then awarded the builder about \$250,000 - the NCAT proceedings were transferred to the District Court - an application by the owner that the builder's adjudicated judgment be stayed was dismissed with costs - the builder sought a stay of the District Court proceedings until the owner paid the adjudicated judgment debt and the costs order - the Court granted this application - the owner sought leave to appeal - the Court heard the application for leave and the appeal concurrently - held: the applicant raised an issue of public importance and general application with reference to the need to reconcile the underlying policy of the legislative scheme (to enable a builder to receive progress payments promptly) while preserving the common law rights of both parties - leave should be granted - the policy of the Act is to ensure that a builder is entitled to receive, and is able to recover, progress payments - however, s32 of the Act preserves the parties' common law and contractual rights - the tension between the policy and the preservation of rights has been commented on in many cases - in the present proceeding, rather than taking available steps to enforce its judgment debt, the builder sought and obtained a stay of the owner's damages proceedings in which the owner was seeking to enforce her rights under or in relation to the construction contract - the primary judge had misconstrued s32(3) by holding that, while s32(3) endorsed a right to bring a claim at common law, this was only after the judgment had been satisfied - the primary judge erred in giving excessive emphasis to the legislative policy and in misunderstanding and misapplying s32 in the particular circumstances of this case - there was nothing stopping the builder from seeking to enforce its judgment debt - further, the primary judge had erred by failing to consider and assess the strength of her case as raised by the amended statement of claim and as supported by an expert report, and by characterising the amended statement of claim as though it were a cross-claim - re-exercising the primary judge's discretion, the Court declined to stay the owner's proceedings - leave to appeal granted and appeal allowed.

[View Decision](#) (I B C)

Virgin v Virgin [2024] WASC 101

Supreme Court of Western Australia

Forrester J

Probate - a deceased left a will appointing his wife as the sole executor and beneficiary of his estate - the deceased was also survived by his two children from a previous marriage - the deceased executed the will in 2005 while he and his wife were travelling in Queensland, and the will was prepared in circumstances in which the wife was to be admitted to hospital to undergo surgery and both the deceased and the wife considered it appropriate to make effectively mirror wills before that occurred - the will was executed validly in accordance with s8 of the *Wills Act 1970* (WA) - the deceased's death certificate recorded one of the causes of death as "Alzheimer's dementia (2004)" - a doctor had reported in 2004 that the deceased's performance on sub?tests of intellectual functioning was highly variable, with his lowest scores in the domains of symbol?number substitution/speed of information processing, and highest scores in the domain of abstract reasoning/concept formation and general knowledge, and that his performance on tests of memory function was uniformly poor - the wife applied for an order pronouncing the force and validity of the Will and a grant of probate in solemn form in her favour - held: the difference in effect between a grant of probate in common form and a grant of probate in solemn form is that the former is revocable and the latter, with some limited exceptions, is irrevocable - a grant of probate in solemn form cannot be made only as a result of the consent of the parties, and the Court must be independently satisfied on the evidence adduced that the documents sought to be propounded constitute the last will and testament of a free and capable testator - if the propounder of a will proves that the will is regular on its face and has been duly executed, presumptions arise that the testator had testamentary capacity and that the testator knew and approved of the contents of that will at the time of execution - the four requirements for testamentary capacity are: (1) the testator must understand the nature of the will and its effects; (2) the testator must understand the extent of the property of which he or she is disposing; (3) the testator must be able to comprehend and appreciate the claims to which he or she ought give effect; and (4) no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made - the contents of the 2004 doctor's report fell far short of demonstrating impairment to such an extent as to suggest the deceased lacked testamentary capacity at the time he executed the will - the Court was satisfied that the presumption of testamentary capacity on the part of the deceased had not been displaced - the force and validity of the will pronounced, and Probate Registrar is directed to issue a grant of Probate in solemn form in favour of the wife.

<https://austlii.edu.au/cgi-bin/viewdoc/au/cases/wa/WASC/2024/101.html> (I B)



Poem for Friday

Autumn Song

By: Paul Verlaine (1844-1896)

Autumn Song

When a sighing begins
In the violins
Of the autumn-song,
My heart is drowned
In the slow sound
Languorous and long
Pale as with pain,
Breath fails me when
The hours toll deep.
My thoughts recover
The days that are over,
And I weep.
And I go
Where the winds know,
Broken and brief,
To and fro,
As the winds blow
A dead leaf.

Chanson d'automne

Les sanglots longs
Des violons
De l'automne
Blessent mon coeur
D'une langueur
Monotone.
Tout suffocant
Et blême, quand
Sonne l'heure,
Je me souviens
Des jours anciens
Et je pleure;
Et je m'en vais

Au vent mauvais
Qui m'emporte
Deçà, delà,
Pareil à la
Feuille morte.

Paul-Marie Verlaine was born on 30 March 1844, in Metz France. He was the son of an army officer, and dearly loved by his mother. He attended the Lycée Bonaparte in Paris obtaining in 1862 the baccalaureate. He then worked as a clerk in an insurance company. At the age of 14 he sent his poem "La Mort" to Victor Hugo. His work was associated with the Decadent and Symbolist movements. He was influenced by Baudelaire and Rimbaud. *Chanson D'Automne*, first published in 1866, is a poem often studied in school in France. In 1940 Charles Trenet put the words of the poem to music. The first phrase of the poem by Verlaine was used by the BBC to announce to the French resistance that the Allies had landed at Normandy. Verlaine's poetry collections include, with publication dates, *Invectives* (1896), *Chair* (1896), *Confessions* (1895), *Femmes* (1890), *Les Poètes maudits* (1884), and *Sagesse* (1880). Verlaine was incarcerated for two years in 1874 having shot Rimbaud during an argument in Brussels the preceding year. On his release in 1875 he stayed in a Trappist retreat, again found his Catholic faith, then moved to England, teaching French. He returned to France in 1877. In 1886 after the death of his mother, and failed attempts to reconcile with his wife whom he had earlier abandoned, he lapsed into alcoholism. He was repeatedly admitted to hospital and despite receipt of monies from admirers and from the state lived in poverty. Verlaine was greatly admired during his life in London and in France. He died on 8 January 1896 at the age of 51 in Paris, France.

Chanson D'Automne, set to music by Stanislav Surin
https://www.youtube.com/watch?v=F6p3_RxJbyc

Charles Trenet sings Chanson D'Automne
<https://www.youtube.com/watch?v=Cu5zpqC6hKE>

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